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TESTIMONY OF

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CONCERNING

SENATE BILL NUMBER 2820

"SURVEILLANCE PRACTICES AND

PROCEDURES ACT OF 1973"

BEFORE

THE SUBCOMMITTEES ON

CRIMINAL LAWS AND PROCEDURES

AND CONSTITUTIONAL RIGHTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

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There is no explicit prohibition, of course; but requirements and restrictions imposed by the bill would be prohibitive in ways I shall explain later.

But first let me say that as Director of the FBI I have found myself in recent months thrust by circumstances into the position of being an official exponent of legal and proper electronic surveillances as an investigative technique.

But I don't mind this. I sincerely believe it's an invaluable and proper technique when used according to the rules of law and ethics.

But, let's be candid, improper electronic surveillances are not only unpopular in today's climate of public opinion, they are downright repugnant to Americans. Reverence for liberty and individual rights, I am proud to say, have been inbred in Americans for two centuries. We place a high value on our right of privacy. And abuses of this right brought to light in the recent past outraged many Americans.

That is really why we are here today.

We are met at a time when this outrage still smoulders in the public forum, and we feel its heat.

It would be easy for my associates and me in the FBI to withdraw from the heat; it would be easy to abandon

Mr. Chairman and members of the Subcommittee, I very much appreciate the opportunity to appear before you today.

My associates and I have carefully reviewed Senator Nelson's bill from the standpoint of its practical application in FBI national security investigations.

And quite frankly, we have concluded that this legislation would in effect prohibit the FBI from using electronic surveillance for intelligence gathering.

the electronic surveillance technique to be laid to eternal rest by its critics.

We gain nothing personally by defending its legal and proper use, nor is the FBI's storied image enhanced by our apologist's role.

Who stands to gain from my presentation here today? In all sincerity, I say our country stands to gain... the American people...the less developed countries throughout this world whose existence is dependent upon a strong and vigorous United States.

So I would urge you, as one of my concerned associates in the FBI's Intelligence Division suggested, not to burn the house down to roast the pig.

Let's first take notice of the fact that the FBI has a vital mission to support the President in discharging certain constitutional mandates: his responsibility to formulate and to implement foreign policy...to maintain our nation's defenses...to preserve the basic structure and existence of our government from hostile acts by foreign powers or their agents.

How do we do this? Essentially, in two ways:

First, the FBI provides the President with intelligence information essential to foreign policy planning

and essential to those officials responsible for the national defense.

If we can provide advance indicators of a dramatic diplomatic initiative by an adversary foreign power, our foreign policy planners are invaluably aided.

If we can detect a spy, the interests of national defense are certainly well served.

Secondly, we support Presidential objectives by investigating violations of Federal statutes relating to the national security such as espionage, sabotage and treason.

I cannot overemphasize the profound importance I attach to the FBI's responsibility to provide the President with the very best information possible to assist him in conducting our foreign policy and maintaining our nation's defenses.

Perhaps the most dramatic illustration of this is provided by the Pearl Harbor tragedy, December 7, 1941. The Army Pearl Harbor Board exhaustively studied the circumstances surrounding that attack, and this was one of the Board's conclusions:

> "The Japanese Armed Forces knew everything about us. We knew little about them...This should not come to pass again...We must know

as much about other major world powers as they know about us. This is an absolute condition precedent to intelligent planning by those charged with formulating our international policies and providing for our security."

With that grim reminder on the record, let me emphasize one or two general conclusions my associates and I have reached regarding the Nelson Bill - conclusions by no means hastily drawn.

The legislation before this Subcommittee would severely hamper the FBI's efforts supportive of our government's ability to effectively conduct relations with other nations, provide for our defense and enforce laws relating to national security.

The bill would affect the national security in ways which I cannot discuss in public session. Detailed discussion could permit hostile foreign intelligence services to adjust their tactics to avoid detection. And such discussion could severely prejudice the vital interests of our government's foreign policy and defense planners.

However, there are some points that I would like to clearly make here and now regarding the severely restrictive provisions of this bill.

First, the Nelson bill would permit the FBI to seek intelligence information through the use of electronic surveillance only against "foreign powers" and "foreign agents," not against American citizens or persons becoming American citizens.

Frankly, we think this is a distinction that may appeal to Americans' pride of citizenship but has no practical, logical basis, or value to them.

To draw such a distinction ignores the fact that individuals and groups in our country have been, are and probably always shall be, influenced and in some cases directed by foreign powers. Remember the German-American Bunds? Shall we forget the close rapport the Communist Party in this nation has with adversary governments? Can we ignore the fact that violence-prone revolutionary groups in this country clasp Chairman Mao's quotations to their bosoms and deify Che Guevara.

Let me give you a more positive example:

A United States District Court recently found that Jewish Defense League harassment of Soviet diplomatic personnel and facilities in New York City so affected our

relations with the Soviet Union as to bring the matter within the purview of the President's authority over the conduct of foreign affairs. This, the court said, justified the FBI's electronic surveillance of Jewish Defense League activities.

But had the Nelson Bill been in effect, the FBI would have been unable to collect intelligence information relevant to formulation of policies regarding the Soviet Union and the Middle East.

It would be naive in the extreme, Mr. Chairman, to assume that only a foreigner is an appropriate subject for an intelligence surveillance to obtain information pertinent to foreign policy or national security.

And please, if you would, carefully consider the bill's inordinately narrow and restrictive definition of "foreign agents:"

One, a foreign agent must be an individual who is not a United States citizen or in the process of becoming one.

Two, the foreign agent's first allegiance must be to a foreign power.

Three, his activities must be intended to serve the interest of that foreign power, and

Four, his activities must be for the purpose of undermining the security of the United States.

We interpret that last provision to mean that only those foreign agents whom we could show are actively undermining the security of the United States could be subjected to a foreign intelligence electronic surveillance.

Each and every element of the bill's definition of a foreign agent must be satisfied before an electronic surveillance warrant may be obtained under this provision.

This in itself could be a formidable piece of work. And it could very well prevent the FBI from obtaining critically needed intelligence information during a grave international crisis.

Consider, for example, a flareup between two small powers - neither interested in undermining the security of the United States, but each of which could inadvertently involve the super powers in a major conflict.

The President might properly instruct that an electronic surveillance be conducted by the FBI to detect early warning signs of major power involvement in the crisis.

Under the Nelson Bill, the FBI would be prohibited from obtaining the essential information if we were unable to show the court that the intended subject of the surveillance was, at that particular time, engaged in activities intended to undermine the security of the United States.

Let's examine another requirement of the bill. It provides that the FBI could not conduct a foreign intelligence surveillance unless a judge finds "probable cause" to believe the surveillance is necessary and will produce the desired results.

There is an express requirement that we furnish "evidence" independent of our conclusory opinion, or others' conclusory opinions, that the surveillance will serve purposes enumerated.

Conclusory opinion standing alone has never been adequate for an arrest or search warrant. While "evidence" is not defined in the bill, its presence in the bill's language suggests something more will be required than presently is required for warrants. But what?

Remember, we are talking about intelligence cases bearing on foreign policy and national defense.

And the bill demands that a judge must find probable cause to believe that the surveillance is necessary and will produce the desired results.

Should judges be burdened with the grave responsibility of deciding whether such surveillances are reasonable and necessary to fulfill information requirements of foreign policy and national defense?

Judges presumably are well qualified by training and experience to exercise final discretion in matters of

law and questions of evidence. But can they be expected to be as well versed in matters of foreign policy and national defense?

Practical experience and common sense compel us to believe that the Nelson Bill's warrant requirements for foreign intelligence electronic surveillances would be unworkable in practice.

For example, we would be unable to obtain a warrant to surveil a suspected foreign intelligence officer unless the Bureau could produce facts showing the surveillance will produce valuable national security information, which we must identify.

It would be a rare case indeed in which we could provide such evidence to a judge.

The FBI's experience with foreign intelligence cases, I can tell you, has clearly demonstrated to us the difficulty in predicting the potential benefits to be derived from a surveillance.

In investigating crimes such as bank robbery or extortion, logical avenues of inquiry are established by the elements of the crime. The evidence sought is clearly prescribed by these elements.

But there are no such guidelines in field of foreign intelligence collection. No single act or event dictates

with precision what thrust an investigation should take; nor does it provide a reliable scale by which we can measure the significance of an item of information.

The value and significance of information derived from a foreign intelligence electronic surveillance often isn't known until it has been correlated with other items of information - items sometimes seemingly unrelated.

Also, difficulty in determining the potential value of information derivable from such an installation makes it hard to predict the required duration of the surveillance.

Which brings us to another point. The Nelson Bill permits warrants for foreign intelligence surveillance installations for only 15 days with extensions of only ten days.

In my opinion, these periods are prohibitively brief and are incompatable with foreign intelligence collection, which must continue as long as foreign intelligence activity poses a threat to the United States.

Furthermore, provisions of the bill would so increase manpower and budgetary requirements that they could conceivably discourage use of this technique even when such use would be prudent and reasonable.

One such provision is the requirement that the FBI furnish the issuing judge progress reports justifying

continuance of the surveillance - apparently in addition to written justification for ten-day requests for extensions.

These progress reports and the ten-day extension periods obviously would impose severe constraints on our foreign intelligence collection responsibilities. I should note that Justice Department policy is to authorize for 90-day periods, initially and for extensions.

Mr. Chairman, there is one provision in this bill which, in itself, would render electronic surveillance useless as a foreign intelligence-gathering technique.

I refer to the requirement that any person whose conversations with a foreign agent are overheard by the FBI through an installation must be furnished complete details of the interception.

This, indeed, would amount to burning the house down to roast the pig.

Let's say we obtained the Attorney General's authorization for an installation at the residence of a known, active foreign intelligence officer in the United States under diplomatic cover.

Let's suppose the FBI overhears conversations between the intelligence officer and two other persons - an American friend with whom he plays tennis, and his ambassador, a bona fide diplomat.

Should the Nelson Bill become law, the FBI would be required to furnish the intelligence officer's tennis partner and his ambassador copies of the warrant authorizing the surveillance. We also would have to furnish them copies of the FBI's application for the warrant.

Bear in mind that the application will contain whatever information the FBI possessed regarding this foreign agent's activities to undermine the security of the United States. We also will have set forth in the application the national security objective served by the surveillance.

We further would be required by disclosure provisions of the Nelson Bill to furnish the tennis partner and the ambassador with a transcript of the intercepted communications.

Under these conditions, I can assure this subcommittee that the intelligence officer could consider himself immune from electronic surveillance by the FBI. We would have no part of it.

Let's consider another point, the provision that evidence of a crime obtained from a foreign intelligence electronic surveillance may not be used in a criminal prosecution.

Doesn't this seem unreasonable? How is our society served by suppressing evidence of a crime discovered during the course of a legal and proper foreign intelligence

electronic surveillance - a surveillance conducted by the FBI as a reasonable and prudent exercise of the President's authority in foreign relations and national defense areas?

It serves no good purpose to preclude use of damning evidence against a foreign intelligence officer without diplomatic immunity simply because the evidence was obtained from such a surveillance.

The Nelson Bill, as I have indicated, requires a judicial warrant for a foreign intelligence electronic surveillance; but it contains no emergency provision.

There is no allowance for surveillance prior to issuance of a warrant in a national emergency. This omission could well deny the President the use of a vital source of information in an international crisis.

The use of electronic surveillance has proved its value time and again in foreign intelligence work. The Nelson Bill would divest us of this technique, and the security of this country would be that much diminished.

Should the Nelson Bill be enacted, no responsible official would recommend use of this technique, even on occasions when its use appears reasonable and prudent.

Permit me to turn now to the Nelson Bill's effect on obtaining evidence of violations of statutes relating to national security.

These restrictions are aimed primarily at electronic surveillances of American citizens or persons in the process of becoming citizens.

Generally speaking, the bill contains provisions which would sharply reduce the value of electronic surveillances in such cases.

To obtain a surveillance installation against a person suspected of committing an offense such as sabotage or espionage, the FBI would be required to meet standards of cause more demanding than those imposed by Title III of the Omnibus Act of 1968.

The Nelson Bill demands that to electronically surveil a suspect the FBI must furnish evidence that suspect has committed or is about to commit a specific offense - such as espionage.

In practical terms, this means we would have to have almost enough evidence against a spy to arrest him before we could obtain an electronic surveillance warrant. This, in effect, rules out intelligence-gathering through electronic surveillance of American citizens.

I should note, too, that under Title III, electronic surveillances may be continued for up to 30 days - thus there is a far more liberal time allowance for ordinary crimes such as gambling than the Nelson Bill provides for national security crimes such as sabotage.

Furthermore, applications for each ten-day renewal period under the Nelson Bill must be supported by information and evidence over and above that furnished initially for the original order.

The practical effect of this is that electronic surveillance in a national security crime case would have to be discontinued in the absence of new evidence of the crime.

Title III imposes no such requirement.

In my opinion, our country would be ill served by making the investigation of violations of national security statutes more difficult than investigation of criminal activity not affecting national security.

In concluding, Mr. Chairman, let me leave you with these thoughts.

As a family man, as an American, as a career lawman, as Director of the FBI, I am deeply committed to the individual's right of privacy. I would never tolerate an unlawful or unethical breach of this right.

I am unequivocably committed to strict adherence to Department of Justice standards to ensure the propriety of intelligence and national security crimes electronic surveillances, as detailed for you by Attorney General Saxbe.

But I am genuinely concerned that the legislation before you would substantially diminish the FBI's ability

to respond to legitimate presidential requirements for foreign intelligence information.

I am genuinely concerned that this bill would likewise diminish our effectiveness with regard to enforcing laws affecting our national security.

I know you must share these concerns.

I am firmly in favor of reasonable measures to avoid abuses, measures which would recognize the President's constitutional authority, but would employ appropriate means to prevent misuse of that authority.

Mr. Chairman, thank you for permitting me to testify. This concludes my remarks. My associates and I will be pleased to answer any questions you may have.